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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-258

DAVID LEHMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-34) has not yet been officially reported.

JURISDICTION

The judgment of the court of appeals was entered June 30, 1972, and a petition for rehearing was denied July 18, 1972. The petition for a writ of certiorari was filed August 16, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Treasury agents who were investigating the possibility that criminal tax violations had been committed by petitioner were required to give him *Miranda*-type warnings when they interviewed petitioner in 1966 prior to the *Miranda* decision.

2. Whether the courts below properly found that petitioner's admission of guilt was voluntary and not otherwise tainted where it followed his voluntary disclosure of records showing twelve instances of failure to report professional fees, even though Treasury agents also inspected two more such records despite a request that no further records be examined.

STATEMENT

Petitioner, an oral surgeon, was convicted after a jury trial of willfully attempting to evade his income taxes for the years 1962 through 1965, in violation of Section 7201 of the Internal Revenue Code of 1954. The four-count indictment charged petitioner with filing false and fraudulent returns during those years for himself and his wife which failed to include substantial amounts of cash receipts from petitioner's professional practice. He was sentenced to prison for three years on each count, the sentences to run concurrently, and was fined $5,000 plus costs (Pet. App. 1-2).

In January 1966, petitioner received a notice that the Internal Revenue Service was conducting an audit of his tax returns. He advised his accountant, who

told him that the Internal Revenue Service would interview him and that he wished to be present when the interview occurred.[1] On the morning of June 8, 1966, without having made any previous contact, Special Agent Barrett and Revenue Agent Fatten met petitioner in the parking lot behind his office. They told him their names and titles, presented their credentials for inspection, and informed him they "were going to make an investigation of his income tax returns." The petitioner agreed to spend an hour or so with the agents even though he had a long-standing golfing date. They waited until he treated two patients. The petitioner made no effort to call his accountant or an attorney then or during the interview, but waited to do so until after the agents' departure.

The actual interview took place in the petitioner's office from about 10:30 a.m. until 5:15 p.m., with the crucial part of the conference occurring in the mid-afternoon (Pet. App. 2-3). At that time, at Barrett's request, petitioner drew out a file drawer containing patient receipt records. The two agents, with petitioner's help, then randomly compared some of the patient records with the cash receipts journal. After finding that the first card had been properly recorded and that the second and third cards were not reflected in the entries, Barrett asked petitioner for an explan-

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[1] In anticipation of the interview, petitioner reconstructed some patient receipts he had destroyed and, having read a "do-it-yourself article" that recommended the self-handling of interviews with Internal Revenue Service agents, decided to handle the interview without an auditor or attorney (Pet. App. 3, 11-12).

ation. Petitioner could not explain the discrepancies. Having noticed that certain patient cards were marked with an "x" in the upper righthand corner, Barrett leafed through the cards and checked ten such cards against the journal. He found in each instance that the card was not recorded. Petitioner appeared very nervous and, after the tenth card was examined, told the agents not to pull any more cards and retired to a couch in a recovery room (R. 341-345; Pet. App. 4-5).[2]

While petitioner was lying down, Barrett continued to ask him about the unreported receipts. The doctor said, "I just don't know what to do" and inquired whether not having the receipts recorded on the books was criminal fraud. The agent replied that it could be if no "plausible excuse" could be found for the failure. Petitioner then asked, "What advice can you give me?" The agent interpreted petitioner's question as a request for advice on whether to make an admission. The agent replied that he could not give him any advice, but suggested that petitioner could tell him the truth so that they could "get at the root of the trouble" (R. 391-394). Shortly thereafter, petitioner arose from the couch and paced up and down the corridor. He questioned Barrett about a Joliet physician who had been convicted of tax evasion (R. 346-347; Pet. App. 5-7).

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[2] The court of appeals said it would assume for purposes of decision that petitioner was in fact ordering a cessation of the examination of the patient cards. The court believed it also possible that petitioner merely wanted momentary relief while he rested on the couch (Pet. App. 5, 14).

Although petitioner had earlier requested that the agents not look at any more cards, Barrett pulled another file drawer and leafed through it. He removed two more patient cards that were also not reflected in the cash receipts book. Petitioner once more asked Barrett not to look at any more cards, and Barrett complied. Barrett again asked petitioner why the receipts were not recorded. A lull in the conversation was immediately followed by the petitioner's confession that he had not been reporting all of his receipts. He explained that his scheme was the non-recording of a portion of his receipts and indicated that the unreported amount was about $40,000. At the conclusion of the interview, petitioner furnished his books and records to the agents (Pet. App. 6-7; R. 347-349, 352, 357-358).

The district court, while "not condon[ing] the acts of the agents" in examining the last two cards, concluded beyond a reasonable doubt that petitioner had voluntarily offered both the admissions and the books and records (R. 457-458). Consequently, the records and the admissions of petitioner were submitted to the jury. After its own extensive review of the record, the court below affirmed the conviction. While agreeing with the district court that the acts of the agents in pulling two additional patient cards after being asked by petitioner not to do so "should not be condoned," the court concluded: "but we likewise agree with the district court that it cannot be realistically said that this momentary action precipitated the confession" (Pet. App. 15). The court assumed that

the two additional cards were illegally examined, but found that neither the petitioner's confession nor his production of the books was due to exploitation of that illegality (Pet. App. 15-16).

The court below also considered certain Internal Revenue Service regulations (Pet. 3; Pet. App. 17-18) which, *inter alia*, forbade agents from denying an individual the right not to give evidence. The court of appeals held that the agents' action in inspecting two additional cards after petitioner's request not to do so was a violation of this regulation, but that such violation of an administrative regulation, on this record, did not justify holding the subsequent confession or production of records tainted (Pet. App. 19-20).

ARGUMENT

1. There is no merit in petitioner's contention (Pet. 2, 15-16) that the court below erred in holding (Pet. App. 9) that he was not entitled to be given *Miranda*-type warnings when he was interviewed in his office by Treasury agents on June 8, 1966. Alone among the circuits, the Seventh Circuit has held that *Miranda* warnings must be given to every taxpayer under investigation upon the occasion of the first contact with him by Treasury agents after the investigation is referred to the Intelligence Division of the Internal Revenue Service. *United States* v. *Dickerson*, 413 F. 2d 1111. This concededly novel rule was expressly limited in application "to interro-

gations taking place after the date of this decision" (*id.* at 1117), which was July 1969, over three years after the interrogation of the petitioner. Petitioner's contention that application of the rule in *Dickerson* to all trials following that decision is required by *Johnson* v. *New Jersey*, 384 U.S. 719, is not well taken. The decision in *Dickerson* was not simply a matter of a routine application of *Miranda*, but rather an extension of the underlying principle to non-custodial interrogations in tax investigations.[3] Accordingly, the Seventh Circuit was free to fashion the chronological rules for application of its new principle in accordance with general guidelines laid down by this Court. It elected to adopt the approach of post-*Johnson* decisions like *Stovall* v. *Denno*, 388 U.S. 293, 297, and *Desist* v. *United States*, 394 U.S. 244, under which the date of the relevant government conduct rather than of commencement of trial deter-

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[3] The court of appeals agreed (Pet. App. 9, 20-21) with the district court's views (R. 458) that Treasury agents used no deceit or coercion. Petitioner can make no colorable claim to having been deprived of his freedom, since he was interviewed in his own office and could have ended the interview at any point at his request. As a matter of fact he had office personnel available and was advised that he should continue to take his calls and talk with patients. The agents informed petitioner they were investigating his tax returns, and he could have called and had his accountant or attorney present. He did in fact talk with his wife, office personnel and friends on several occasions (Pet. App. 10-13) and for his own reasons chose not to call his tax counsel (Pet. App. 3, 11). At 11:00 a.m. and again at noon, petitioner was asked if he wished to continue the interview and replied that he did wish to continue (R. 335-336).

mines whether a new constitutional rule governs. This decision, which avoids imposing sanctions for acts or omissions that were lawful at the time, was entirely reasonable and should not be disturbed. See also *Adams* v. *Illinois*, 405 U.S. 278, 280-281.[4]

2. Nor is there merit in petitioner's contention (Pet. 2, 10-13) that all of his records were the subject of an illegal search and seizure and that his subsequent confession should have been suppressed because it was the "proximate result" of the alleged illegality. The district court and the court of appeals both found that petitioner furnished all of his records "freely" to the Treasury agents, with the exception of the last two items inspected by the agents after petitioner objected (R. 459; Pet. App. 16). Examination of the two additional cards was said to be "of questionable constitutional propriety" (Pet. App. 16). The district court found, however, that petitioner's decision to admit wrongdoing was "voluntary" (R. 458) and "unrelated" (R. 460) to any part of the agents' conduct that might have been illegal. It also found that petitioner's subsequent delivery of his books to the agents was not attributable to the agents' inspection of the two additional patient cards, which were merely cumulative (R. 459). The court of appeals agreed (Pet. App. 9-10, 12-14), and both courts concluded (R. 459; Pet. App. 16) that neither petitioner's confession nor his books were "come at" by

[4] The issue of the retroactivity of the *Dickerson* ruling has ceased to be of general importance in view of the passage of more than three years since the date of that decision.

exploitation of any alleged illegality or impropriety within the meaning of *Wong Sun* v. *United States*, 371 U.S. 471, 488.[5] In the absence of a causal relationship between the possible illegality and the procurement of the evidence used at trial, application of an exclusionary rule would have been wholly inappropriate.[6]

It is clear that the findings of the courts below are supported by the "totality of the circumstances" and should not be disturbed. *Morales* v. *New York*, 396 U.S. 102, 104. In addition to the circumstances set forth above and in the opinion of the court of appeals, it may be noted that, in all his testimony on the motion to suppress, the petitioner never once mentioned the two-card incident (R. 241-283). His testimony shows that from the moment when the first twelve unreported items were discovered to his ultimate admission of wrongdoing, he was weighing without interruption the possibility of escaping the punishment suffered by another local doctor and ultimately chose to "cooperate" (R. 272) in his own interests and of his own volition (R. 268-277). As the two-card incident did not impress petitioner, and as it was the

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[5] The use by the court of appeals of the phrase "*de minimis non curat lex*" (Pet. App. 16) in referring to the two-card incident was simply part of its resolution of the issue of exploitation of alleged illegality. The court chose this way of saying that any error in the agents' conduct was harmless.

[6] The district court found "beyond a reasonable doubt, that the challenged evidence was voluntarily disclosed and not the result of the invasion of any constitutional rights * * *" (R. 460).

only arguably improper conduct by the agents (R. 458), there is no basis for setting aside the decision of the courts below that the confession was wholly voluntary.

Petitioner makes a related contention in challenging the use of his confession or records, contending that he was denied due process because the Treasury agents violated their internal operating instructions by the manner in which they interviewed him (Pet. 2, 13-15). Prior to 1967, no Internal Revenue Service regulation required that *Miranda*-type warnings be given by agents to persons under investigation.[7] However, at the time of the interview in this case there were provisions in Internal Revenue Manual MT 9300-20, Sec. 9384.2 (Pet. App. 17-18) that agents:

> (b) Will not use trickery, misrepresentation, or deception in obtaining such evidence or in explaining, if asked, the taxpayer's or principal's constitutional rights or the purpose of the investigation;
>
> * * * *
>
> (d) Will not deny an individual the right to counsel nor the right to refuse to give any evidence or make any statements which such individual believes might incriminate him under any State or Federal law.

The district court found that the agents did not lull petitioner into a false sense of security (R. 457)

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[7] See Internal Revenue Service News Release, No. IR-897, October 3, 1967 (1967 C.C.H. Fed. Tax Reporter, par. 6832); Internal Revenue Service News Release, No. IR-949, November 26, 1968 (1968 C.C.H. Fed. Tax Reporter, par. 6946).

or engage in any improper conduct except the unauthorized inspection of the last two patient cards (R. 458). The court of appeals agreed that the agents did not violate clause (b), *supra*, concluding that none of petitioner's remarks were intended as requests for advice on constitutional rights and, further, that the agents used no trickery or deception in declining to give definitive advice as to the ultimate conclusions or official decisions that might ensue from the investigation (Pet. App. 18-21). While the court concluded that the agents acted contrary to clause (d), *supra*, in inspecting the last two patient cards, it properly held that this violation provides no greater basis for excluding the confession and records than do the same actions when viewed in a constitutional setting (Pet. App. 19-20). The necessary causal predicate for exclusion continues to be absent.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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